

**A Md Aris bin Zainal Abidin v Suruhanjaya Pasukan Polis
 & Anor**

HIGH COURT (PULAU PINANG) — ORIGINATING MOTION NO 25 –3 OF
1993

B KAMALANATHAN RATNAM J
22 SEPTEMBER 2003

C *Police — Disciplinary proceedings — Dismissal — Disciplinary action against applicant under general order 26 of Public Officers (Conduct and Discipline) General Orders (Cap D) 1980 — Complaint against applicant related to failure to pay friendly loan — No corrupt practice involved — Whether first respondent should have proceeded under general order 11 which dealt with ‘serious pecuniary indebtedness’ instead of general order 26 — Whether tantamount to breach of procedural fairness warranting judicial review*

D *Police — Disciplinary proceedings — Dismissal — Delegation of power to dismiss officers — Name of police officer signing dismissal letter not typed or printed — Deputy Inspector General of Police authorized police officer to sign dismissal letter on his behalf — Whether maxim delegatus non potest delegare applied*

E This suit was brought by the applicant who was, prior to his dismissal, an Inspector of the Royal Malaysian Police. He claimed that his dismissal was unlawful for non-compliance with the rules of natural justice. The facts were that the applicant had borrowed a sum of RM15,000 as a friendly loan without interest from one Dato’ Tan Heng Chew, the deputy chairman of Tan Chong Motors Sdn Bhd. On 4 September 1992, the applicant received a letter signed by the Penolong Ketua Urusetia, KPN, namely, Dato’ Hj Ahmad Ragib informing the applicant that the first respondent had decided to take disciplinary action against him under general order 26 of the Public Officers (Conduct and Discipline) General Orders (Cap D) 1980 with a view to dismiss him. The ‘misconduct’ of the applicant with reference to general order 26 was his failure to pay the friendly loan. The parties agreed that there was no corrupt practice involved as the loan was a mere friendly loan. The first issue taken by the applicant was to attack the procedure adopted by the first respondent. It was the case of the applicant that instead of proceeding under general order 26, which specifically dealt with ‘unsatisfactory work’ or ‘misconduct’, the first respondent ought to have proceeded under general order 11, which dealt with ‘serious pecuniary indebtedness’. The other issue taken by the applicant was that the dismissal letter was not signed by the Timbalan Ketua Polis Negara or his authorized officer, Dato’ Hj Ahmad. The signature in the dismissal letter was a scribble with the word ‘for’ placed before Dato’ Hj Ahmad’s name and the letters ‘AOL’ (or ‘absent on leave’) written thereon.

I Held, allowing the application:

- (1) The senior federal counsel's argument was that by being unable to pay his debt, the applicant had brought disrepute to the Government and was therefore guilty of misconduct. If this line of argument was to be accepted then almost every government servant who had taken loans and had defaulted for one reason or another, can be guilty of a charge of breaching general order 26. Many a reason can occasion a default in payment. In any case, if such was the intent as argued by the learned senior federal counsel, then surely the charge could have been framed under general order 11(2) which provided that if the officer by his indebtedness had brought the public service to disrepute, he could be liable for disciplinary action. In that event, the first respondent would have had to establish that the applicant was in 'serious pecuniary indebtedness' as defined in general order 11(1). The applicant would then be entitled to show, pursuant to general order 11(2), that such 'serious pecuniary indebtedness' had occurred as a result of 'unavoidable misfortune not contributed to in any way by him'. He would have been allowed to address this line of defence and focus his attention to show that the indebtedness was unavoidable. The Government saw it fit to defend and assist its employees who found themselves in such situations. Hence, it was obvious that by failing to prefer a charge under general order 11(2), the applicant had been deprived of the opportunity of addressing the lines of defences open to him under general order 11 (see p 531E-532A). A
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- (2) Any act or conduct by the first respondent that restricted or appeared to restrict the applicant's ability to present his case in a manner that can best give him an opportunity to exculpate himself, may be held to be a breach of procedural fairness and thereby warranting a judicial review. Whether there had been such a breach can be ascertained by examining the facts such as in this case where the applicant was prevented from explaining if he was suffering from 'serious pecuniary indebtedness'. In the circumstances, it was plain that the first respondent ought to have proceeded pursuant to general order 11 and not general order 26. The failure of the first respondent to proceed under the right of the general orders was tantamount to failing to take the preliminary step which the law regarded as essential (see p 532D-H); *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 followed. F
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- (3) It was clear from general order 23 that the applicant shall not be dismissed or reduced in rank unless he had been informed in writing of the grounds under which it was proposed that action be taken against him. Although the applicant had been duly notified in writing of the charges he was to face, the only punishment alluded to in the letter of 4 September 1992 was dismissal. This clearly showed that the appropriate disciplinary authority did not consider the other form of punishment it had to consider, namely 'reduction in rank' (see pp 534F-G, 535A). H
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- A** (4) In his representation made in response to the charges preferred against him, the applicant had pleaded that he be not dismissed but be given alternative punishment. Since the applicant had brought to the attention of the appropriate disciplinary authority that punishment other than dismissal ought to be considered, the appropriate disciplinary authority was duty bound to amend its notice in writing or at least to inform the applicant that they would be considering alternative punishments. Instead, the appropriate disciplinary authority totally disregarded the applicant's plea and proceeded to consider only dismissal. It was obvious that there was a flaw in the decision-making process that warranted this court's interference (see p 534C–D).
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- (5) In the instant case, although the actual name of the person signing the dismissal letter had not been typed or printed, the Deputy Inspector General of Police who affirmed the affidavit had identified the person as a police officer, Johar bin Che' Din, who was authorized by him to sign on his behalf. As such, the said affidavit was sufficient and the applicant's argument that the maxim *delegatus non potest delegare* (or a delegate cannot further delegate the power to someone else) ought to apply, must fail. It was not Dato' Hj Ahmad Ragib who had delegated the authority to Johar bin Che' Din to sign but the Deputy Inspector General of Police himself (see pp 537H–538A); *Marzuki Abdul Aziz v Ketua Polis Negara & Anor* [2003] 3 CLJ 315 followed
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- (6) After considering all the arguments, the court found that the applicant had been wrongly dismissed. Accordingly, it was ordered that the applicant be reinstated in the police force in his former position and to accrue all benefits to date. The applicant would also be entitled to such promotions that he would have received to date if not for the dismissal (see p 538A–B).
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[Bahasa Malaysia summary]

- G** Guaman ini telah dimulakan oleh pemohon yang merupakan, sebelum pemecatan beliau, seorang Inspektor Polis Di Raja Malaysia. Beliau mendakwa bahawa pemecatan beliau adalah menyalahi undang-undang kerana ketidakpatuhan dengan rukun-rukun keadilan asasi. Fakta-fakta adalah di mana pemohon telah meminjam sejumlah RM15,000 sebagai satu pinjaman persahabatan daripada seorang Dato' Tan Heng Chew, timbalan pengarah Tan Chong Motors Sdn Bhd. Pada 4 September 1992, pemohon telah menerima sepucuk surat yang ditandatangani oleh Penolong Ketua Urusetia, KPN, iaitu, Dato' Hj Ahmad Ragib memaklumkan pemohon bahawa responden pertama telah memutuskan untuk mengambil tindakan undang-undang terhadap beliau di bawah peraturan am 26 Peraturan-Peraturan Am (Kelakuan dan Tata tertib) Pegawai-Pegawai Am (Bab D) 1980 dengan tujuan untuk memecat beliau. 'Salah laku' pemohon merujuk kepada peraturan am 26 adalah kegagalan beliau untuk
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membayar pinjaman persahabatan tersebut. Pihak-pihak telah bersetuju bahawa tiada amalan korup berlaku kerana pinjaman tersebut cuma satu pinjaman persahabatan. Persoalan pertama yang diambil oleh pemohon adalah untuk mencabar prosedur yang digunakan oleh responden pertama. Adalah diujahkan oleh pemohon bahawa responden pertama sepatutnya memulakan prosiding di bawah peraturan am 11 yang membincangkan tentang 'serious pecuniary indebtedness' dan bukan peraturan 26, yang dengan spesifiknya membincangkan tentang 'unsatisfactory work' atau 'misconduct'. Persoalan lain yang diambil oleh pemohon adalah bahawa surat pemecatan tersebut tidak ditandatangani oleh Timbalan Ketua Polis Negara atau pegawai beliau yang telah diberikan kuasa, Dato' Hj Ahmad. Tandatangan dalam surat pemecatan tersebut hanya diconteng perkataan 'for' diletak sebelum nama Dato' Hj Ahmad dan huruf-huruf 'AOL' (atau 'absent on leave') yang ditulis di situ.

Diputuskan, membenarkan permohonan tersebut:

- (1) Hujah peguam kanan persekutuan adalah bahawa kerana tidak mampu untuk membayar hutang tersebut, pemohon telah menjejaskan reputasi Kerajaan dan oleh itu bersalah kerana salah laku. Jika hujah sebegini diterima maka kebanyakan pegawai kerajaan yang mengambil pinjaman dan gagal kerana satu sebab atau lain membuat bayaran, boleh menjadi bersalah kerana pertuduhan melanggar peraturan 26. Banyak sebab boleh dikaitkan dengan kegagalan membuat bayaran. Dalam apa keadaanpun, jika demikianlah niatnya sebagaimana yang diujahkan oleh peguam kanan persekutuan yang bijaksana, maka semestinya pertuduhan tersebut boleh diberituk do bawah peraturan am 11(2) yang memperuntukkan bahawa jika pegawai oleh kerana keberhutangan beliau telah menjatuhkan reputasi pegawai, beliau boleh dikenakan tindakan tatatertib. Sekiranya demikian, responden pertama hendaklah membuktikan pemohon berada dalam 'serious pecuniary indebtedness' sepertimana yang ditafsirkan dalam peraturan 11(1). Pemohon hendaklah kemudian berhak untuk menunjukkan, menurut peraturan am 11(2), bahawa 'serious pecuniary indebtedness' sedemikian telah berlaku akibat daripada 'unavoidable misfortune not contributed to in any way by him'. Beliau akan dibenarkan untuk mengutarakan pembelaan ini dan memfokuskan perhatian beliau untuk menunjukkan bahawa keberhutangan tersebut tidak dapt dielakkan. Kerajaan berpendapat ia adalah sesuai untuk melindungi dan membantu kakitangan-kakitangannya yang mendapati mereka berada dalam keadaan sedemikian, Justeru itu, ia dalah jelas bahawa dengan kegagalan untuk merujuk kepada satu pertuduhan di bawah peraturan 11(2), pemohon telah terkilan terhadap satu peluang mengutarakan pembelaan-pembelaan terbuka kepada beliau di bawah peraturan am 11 (lihat ms 531E-532A).

- A** (2) Apa-apa tindakan atau perbuatan oleh responden pertama yang menghalang atau kelihatan seperti menghalang kemampuan pemohon untuk mengemukakan kes beliau yang boleh memberikan beliau peluang untuk membebaskan diri, boelh diputuskan sebagai satu pelanggaran prosedur keadilan dan oleh
- B** itu mewarankan satu kajian semula kehakiman. Sama ada terdapat pelanggaran sedemikian boleh ditentukan dengan meneliti fakta-fakta tersebut seperti dalam kes ini di mana pemohon telah dihalang daripada memberikan penjelasan jika beliau mengalami 'serious pecuniary indebtedness'. Dalam keadaan sedemikian, adalah jelas bahawa responden pertama septutnya memulakan prosiding menurut peraturan am 11 dan bukan peraturan am 26. Kegagalan responden pertama untuk memulakan prosiding di bawah peraturan am yang betul sama seperti gagal untuk mengambil langkah awal yang dianggap penting oleh undang-undang (lihat ms 532D-H); *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 diikuti.
- D** (3) Adalah jelas dari peraturan am 23 bahawa pemohon tidak sepatutnya dipecat atau diturunkan pangkat kecuali beliau telah dimaklumkan secara bertulis alasan-alasan di mana ia dicadangkan bahawa tindakan telah diambil terhadap beliau. Walaupun pemohon telahpun dimaklumkan secara bertulis pertuduhan yang dihadapkan kepada beliau, satu-satunya hukuman yang wujud dalam surat 4 September 1992 adalah pemecatan. Ini dengan jelas menunjukkan bahawa pihak berkuasa tatatertib yang bersesuaian tidak menimbangkan bentuk hukuman lain yang perlu diberi pertimbangan, terutamanya 'reduction in rank' (lihat ms 534F-G, 535A).
- E**
- F** (4) Dalam representasi beliau yang dibuat menjawab pertuduhan-pertuduhan yang dibuat terhadapnya, pemohon telah memplidkan bahawa beliau tidak dipecat tetapi telah diberikan hukuman alternatif. Memandangkan pemohon telah menarik perhatian pihak berkuasa tatatertib yang bersesuaian bahawa hukuman selain pemecatan sepatutnya dipertimbangkan, pihak berkuasa tatatertib yang bersesuaian adalah terikat untuk meminda notis bertulisnya atau sekurang-kurangnya memaklumkan pemohon bahawa mereka akan mempertimbangkan hukuman-hukuman alternatif. Sebaliknya, pihak berkuasa tatatertib yang bersesuaian langsung tidak menghiraukan rayuan pemohon dan hanya mengambilkira pemecatan sahaja. Adalah jelas bahawa terdapat kelemahan dalam proses membuat keputusan yang mewarankan campur tangan mahkamah (lihat ms 534C-D).
- H**
- I** (5) Dalam kes semasa, walaupun nama sebenar individu yang menandatangani surat pemecatan tersebut tidak ditaipkan atau dicetak, Timbalan Ketua Polis Negara yang mengesahkan affidavit telah mengenalpasti individu tersebut sebagai seorang pegawai polis, Johar bin Che' Din, yang telah diberikan kuasa oleh beliau

untuk menandatangani bagi pihak beliau. Oleh itu, affidavit tersebut adalah memadai dan hujah pemohon bahawa maxim *delegatus non potest delegare* (atau seorang wakil tidak dapat menugaskan kuasa kepada orang lain) adalah terpakai, harus gagal. Ia bukan untuk Dato' Hj Ahmad Ragib yang telah mewakili kuasa tersebut kepada Johar bin Che' Din untuk menurunkan tandatangan tetapi Timbalan Ketua Polis Negara sendiri (lihat ms 537H–538A); *Marzuki Abdul Aziz v Ketua Polis Negara & Anor* [2003] 3 CLJ 315 diikuti.

- (6) Setelah menimbangkan semua hujah-hujah tersebut, mahkamah mendapati pemohon telah dipecat secara salah. Sewajarnya, ia diperintahkan bahawa pemohon dikembalikan jawatan dalam angkatan kepada jawatan asal beliau dan diberikan faedah-faedah yang terakru sehingga kini. Pemohon juga berhak mendapat kenaikan pangkat yang mungkin beliau sepatutnya terima sehingga kini jika bukan kerana pemecatan tersebut (lihat ms 538A–B).]

Notes

For cases on dismissal under disciplinary proceedings of police, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue), paras 1095–1119.

Cases referred to

Malloch v Aberdeen Corporation [1971] 2 All ER 1278(folld)

Marzuki Abdul Aziz v Ketua Polis Negara & Anor [2003] 3 CLJ 315 (folld)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935

Ghazi bin Mohd Sawi v Mohd Hanif bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114

Yap Jack Keet v Ketua Polis Negara & Anor [2000] 7 CLJ 74

Legislation referred to

Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 general orders 11(1), (2), (3), (4), (5), (6), (7), 23, 24, 25, 26(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11)

Rules of the High Court 1980 O 53 r 1A

Mohd Ismail bin Mohamed (Ismail, Khoo & Assoc) for the appellant.

Mohamad Naser bin Disa (Senior Federal Counsel, Attorney-General's Chambers) for the respondent.

A Kamalanathan Ratnam J:*Facts*

This suit is brought by the plaintiff who was, prior to his dismissal, an Inspector of the Royal Malaysian Police. He is claiming that the dismissal was unlawful for non-compliance with the rules of natural justice. On 1 December 1990, the plaintiff borrowed a sum of RM15,000 as a friendly loan without interest from one Dato' Tan Heng Chew, the Deputy Chairman of Tan Chong Motors Sdn Bhd, Kuala Lumpur. On 4 September 1992, the plaintiff received a letter signed by the Penolong Ketua Urusetia, KPN (Hj Ahmad Ragib bin Hj Mohd Salleh) on behalf of the TKPN ('first defendant') informing the plaintiff that the defendant, acting in pursuance of the powers delegated to him by the Suruhanjaya Pasukan Polis vide PU(B)621 dated 19 December 1985 had decided to take disciplinary action against him under general order 26 of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 with a view to dismissal only.

The plaintiff faced three charges which are reproduced herewith:

First Charge:

Bahawa anda, seorang Pegawai Awam, iaitu Inspektor dalam Pasukan Polis Di Raja Malaysia, pada masa itu bertugas sebagai Pegawai Penyelaras di Ibu Pejabat Daerah Polis Brickfields, Kuala Lumpur, telah didapati berkelakuan dengan sedemikian cara hingga menjatuhkan reputasi Perkhidmatan Awam, kerana gagal membayar semula 'friendly loan' sebanyak RM15,000 yang dibuat pada 6/12/90 dari Datuk Tan Heng Chiew, Timbalan Pengerusi Syarikat Tan Chong Motors, Kuala Lumpur pada tarikh yang ditetapkan, di mana perbuatan demikian menyebabkan orang awam hilang kepercayaan kepada anda sebagai seorang Pegawai Awam hingga merujukkan perkara itu kepada Ketua atasan anda. Dengan yang demikian anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am 4(2)(d) , Perintah-perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980.

Second Charge:

Bahawa anda, seorang Pegawai Awam, iaitu Inspektor dalam Pasukan Polis Di Raja Malaysia, pada masa itu bertugas sebagai Pegawai Penyelaras di Ibu Pejabat Daerah Polis Brickfields, Kuala Lumpur, telah didapati Ingkar Perintah kepada HT/KPN A 207 di para 96 kerana tidak melaporkan kepada Pegawai Pemerintah anda, iaitu telah berhutang dalam keadaan kesusahan berat yang melebihi tiga kali emolumen bulanan anda, dimana telah membuat 'Friendly Loan' sebanyak RM15,000 tanpa bercagar dari Datuk Tan Heng Chiew Timbalan Pengerusi Syarikat Tan Chong Motors, Kuala Lumpur. Dengan yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am (2)(i), Perintah-perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (bab D) 1980.

Third Charge:

Bahawa anda, seorang Pegawai Awam, iaitu Inspektor dalam Pasukan Polis Di Raja Malaysia, yang bertugas di Ibu Pejabat Daerah Polis Alor Setar, Kedah Darul Aman, telah memungkir janji kepada PPjP Ahmad Al Bakish, Timbalan Ketua Polis Kedah Darul Aman, di mana semasa dipanggil ke

pejabatnya pada 17 Mac 1992 lebih kurang jam 0930, telah berjanji akan membuat pembayaran sebanyak RM250 sebulan mulai April 1992 sehingga selesai hutang anda sebanyak RM15,000 kepada Datuk Tan Heng Chiew, yang mana hutang itu hanya dibayar mulai Mei 1992 manakala Surat Undertaking itu diserahkan kepada Timbalan Ketua Polis Kedah pada 26 Mei 1992. Dengan yang demikian, anda telah melakukan pelanggaran tatatertib di bawah Perintah Am 4(2)(f) Perintah- perintah Am Pegawai Awam (Kelakuan dan Tatatertib)(Bab D) 1980.

The plaintiff replied to the said charges but he was dismissed based on all the three charges. The letter of dismissal was signed by a person unknown, on behalf of Hj Ahmad Ragib bin Hj Mohd Salleh, the Penolong Ketua Urusetia KPN with the words 'AOL' written beside the name.

Findings of the court

This case has a chequered history. When the motion first came up for hearing, the learned federal counsel took a preliminary objection as to the jurisdiction of the court to hear the matter on the basis that the motion had been filed more than six weeks after the date of his dismissal which was on 28 December 1992, based on r 1A of O 53 of the Rules of the High Court 1980. The whole of that order has since been replaced vide PUA 342/2000 which came into force on 22 September 2000. Relying on the decision of *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54, the learned trial judge who heard the motion, dismissed it.

In allowing the appeal, the Court of Appeal in *Md Aris bin Zainal Abidin v Suruhanjaya Pasukan Polis & Anor* [2002] 4 MLJ 105 held that it was contrary to the rules of natural justice to require the applicant to make his application for leave for certiorari within six weeks from the date of a decision, since the decision to dismiss the appellant was made on 28 December 1992 but was only communicated to him on 16 January 1993. The Court of Appeal said at p 17 as follows:

In our considered judgment r 1A of the RHC [Rules of the High Court 1980] should be read harmoniously with art 5(1) of the Federal Constitution. When this is done, the words '... after the date of the proceedings' must fall to be interpreted so that time runs from the date the decision was communicated to the appellant.

Since there was no further appeal to the Federal Court the matter has now come before me.

Procedural defects

The first issue taken by the applicant is to attack the procedure adopted by the first respondent. It was the case of the applicant that instead of proceeding under GO 26, the applicant ought to have proceeded under GO 11. It is therefore necessary to reproduce both these general orders.

Public Officers (Conduct and Discipline) (Cap D) General Orders 1980, GO 26(1)– (11) reads as follows:

- A** 26(1) Where it is represented to, or is found by, the Appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.
- B** (2) The Appropriate Disciplinary Authority shall, after considering all the available information in its possession that there is a prima facie case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.
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- (3) If after consideration of the said representation, the Appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.
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- (4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.
- E** (5) Where the Appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.
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- (6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and if the Committee shall so determine, shall be required to appear before the Committee and exculpate himself.
- G** (7) If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.
- (8) The Committee may permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission:
- H**
- Provided that where the Committee permits the Government to be represented, it shall also permit the officer to be similarly represented.
- I** (9) If, during the course of the inquiry, further grounds for dismissal are disclosed, and the Appropriate Disciplinary Authority thinks fit to proceed against the officer upon such grounds, the officer shall be

furnished with a written statement thereof and the same steps shall be taken as are prescribed above in respect of the original grounds.

- (10) The Committee having inquired into the matter, shall make a report to the Appropriate Disciplinary Authority. If the 'Disciplinary Authority considers that the report is not clear in any respect or that further inquiry is desirable, the matter may be referred back to the Committee for further inquiry and report.

- (11) If, upon considering the report of the Committee the Appropriate Disciplinary Authority is of the opinion —

- (a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;
- (b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or
- (c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question of pension will be dealt with under the Pensions Act.

General order 11(1)–(7) reads as follows:

- 11(1) For the purpose of these General Orders the expression 'serious pecuniary indebtedness' means the state of an officer's indebtedness which, having regard to the amount of debts incurred by him, has actually caused serious financial hardship to him; and without prejudice to the general meaning of the said expression, an 'officer shall be deemed to be in serious pecuniary indebtedness —

- (a) Where the aggregate of an officer's unsecured debts and liabilities at any given time exceeds the sum of three times his monthly emoluments;
 - (b) where he is a judgment debtor and the judgment debt has not been settled within one month of the date of the judgment; or
 - (c) where he is a bankrupt or an insolvent wage earner, as the case may be, for so long as any judgment against him in favour of the Official Assignee remains unsatisfied.
- (2) Serious pecuniary indebtedness from whatever cause other than the result of unavoidable misfortune not contributed to in any way by the officer himself shall be regarded as bringing the public service into disrepute and shall render him liable to disciplinary action.
- (3) If serious pecuniary indebtedness which has occurred is the result of unavoidable misfortune, the Government may give the officer such assistance as the circumstances appear to warrant.
- (4) If an officer finds that his debts cause or are likely to cause serious pecuniary indebtedness to him, he shall forthwith report this fact to the Head of Department.
- (5) An officer who fails or delays in reporting his serious pecuniary indebtedness or who reports the same but fails to disclose its full extent or gives false or misleading account thereof, shall be guilty of a serious

- A breach of discipline (whatever the first cause of the indebtedness may be), and shall render himself liable to disciplinary action.
- (6) As long as an officer is in serious pecuniary indebtedness he may be disqualified for promotion or acting in a higher appointment or covering another post in addition to his duties.
- B (7) Where an officer's debts amount to serious pecuniary indebtedness but he has not been adjudged a bankrupt or an insolvent wage earner, his case shall be reviewed annually by the Head of Department.

C At the outset it was made easier for this court by the agreement of both counsel that the 'misconduct' of the applicant with reference to general order 26 was his 'failure to pay' the loan. There was also the agreement that there was no corrupt practice involved since the loan was a mere friendly loan.

D Encik Ismail for the applicant pointed out that where there is a specific provision of the general order under which the applicant could have been charged, namely, general order 11 which dealt with 'serious pecuniary indebtedness', the first respondent was wrong in electing to proceed under general order 26 which specifically dealt with 'unsatisfactory work' or 'misconduct'. Further, it was argued that since there was no complaint regarding the applicant's work, the generalization of the word 'misconduct' to apply to 'borrowing money' and being unable to pay is inappropriate.

E Scores of decided cases have illustrated what misconduct is. To name a few, refusing to follow superior's orders, accepting bribes, fighting, showing indiscipline and the examples can go on. But in the General Orders 1980 there is a specific provision that deals with a case of serious pecuniary indebtedness.

F It was argued by learned senior federal counsel that by being unable to pay his debt, the applicant had brought disrepute to the Government and is therefore guilty of misconduct. If this line of argument is to be accepted then almost every Government servant who has taken loans and had defaulted for one reason or the other, can be guilty of a charge of breaching general order 26. Government servants acceptedly earn less than employees of similar rank in the private sector. Many a reason can occasion a default in payment. In any case if such was the intent as argued by the learned senior federal counsel then surely the charge could have been framed under GO 11(2) which provided that if the officer by his indebtedness brought the public service to disrepute, he could be liable for disciplinary action.

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H However if the applicant had been charged under general order 11(2) then the first respondent would have had to establish that the applicant was in 'serious pecuniary indebtedness' as defined in general order 11(1).

I Then the provision of general order 11(2) also gives the applicant a defence. He could be entitled to show that such 'serious pecuniary indebtedness' had occurred as a result of 'unavoidable misfortune not contributed to in any way by him'. He would have been allowed to address this line of defence and to focus his attention to show that the indebtedness was unavoidable.

Then again if he was able to show such a line of defence, general order 11(3) would have come into play. The Government saw it fit to defend and assist its employees who found themselves in such situations. It is obvious that by failing to prefer a charge under general order 11(2), the applicant had been deprived of the opportunity of addressing the lines of defences open to him under general order 11.

In *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935, the House of Lords held that administrative action is subject to control by judicial review under three heads:

- (1) illegality, where the decision-making authority has been guilty of an error of law, eg by purporting to exercise a power it does not possess;
- (2) irrationality, where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision;
- (3) procedural impropriety, where the decision-making authority has failed in its duty to act fairly.

It is axiomatic that any act or conduct by the first respondent that restricted or appeared to restrict the applicant's ability to present his case in a manner that can best give him an opportunity to exculpate himself, may be held to be a breach of procedural fairness and thereby warranting a judicial review. And whether there has been such a breach can be ascertained by examining the facts such as in this case where the applicant was inhibited from being able to explain if he was suffering from 'serious pecuniary indebtedness'.

In this context, I draw to mind the salutary warning of the then Supreme Court in *Ghazi bin Mohd Sawi v Mohd Hanif bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 which said at p 130 as follows:

In dealing with Ch D of the 1980 General Orders we remind ourselves that we are dealing with General Orders that have legislative effect and we must guard ourselves against adding words into them which were never intended.

In the circumstances, it is plan that the first respondent ought to have proceeded pursuant to general orders 11 and not 26. Finally I can do no better than to refer to the decision of the House of Lords in *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 which held that where an employer failed to take the preliminary steps which the law regarded as essential, he had no power to dismiss, and any purported dismissal was a nullity. Applying this rationale to the case before me, the failure of the first respondent to proceed under the right general order was in my view, tantamount to failing to take the preliminary step which the law regards as essential.

Ultra vires

The disciplinary procedures relating to this case can be said to be governed by general orders 23, 24, 25 and 26. It is therefore necessary to reproduce general orders 23, 24 and 25 since general order 26 has already been earlier reproduced.

- A** 23 In all disciplinary proceedings under this Part no officer shall be dismissed or reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard:

Provided that this General Order shall not apply to the following cases:

- B** (a) Where the Appropriate Disciplinary Authority is satisfied that for some reason, to be recorded by it in writing, it is not reasonably practicable to carry out the requirements of this General Order; or
- (b) Where the Yang di-Pertuan Agong is satisfied that in the interest of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this General Order.
- C**

- 24 In every case of an alleged breach of discipline by any officer except as provided for under General Order 27(a) and (b), the Chairman of the Appropriate Disciplinary Authority shall, in the first instance, before commencing any disciplinary proceeding in the matter, consider whether the breach of discipline complained of is a nature which merits a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank.
- D**

- 25(1) Where the Chairman of the Appropriate Disciplinary Authority decides under General Order 24 that the breach of discipline alleged merits punishment lesser than dismissal or reduction in rank, the officer shall be informed in writing of the facts of the breach of discipline alleged against him and be given an opportunity of making a representation in writing, against the allegation.
- E**

- (2) After considering the representation under paragraph (1), the Appropriate Disciplinary Authority shall determine whether or not the officer is guilty of the alleged breach of discipline and if it determines that he is guilty thereof it shall impose any one or more of the punishments specified in General Order 36.
- F**

- It is clear from general order 23 that the applicant shall not be dismissed or reduced in rank unless he had been informed in writing of the grounds under which it is proposed that action be taken against him. Whilst the applicant herein had been duly notified in writing of the charges he was to face by a letter dated 4 September 1992 and signed by the Penolong Ketua Urusetia KPN (Tatatertib) a relevant portion of the said letter needs to be reproduced. It reads:
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- H** Adalah saya diarah memaklumkan bahawa Timbalan Ketua Polis Negara, pada menjalankan kuasa-kuasa yang telah diwakilkan kepadanya oleh Suruhanjaya Pasukan Polis melalui PU(B) 621 bertarikh 19/12/85, telah memutuskan untuk mengambil tindakan tatatertib terhadap anda di bawah Perintah Am 26, Perintah-perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980. Representasi telah dibuat kepada Timbalan Ketua Polis Negara di atas sikap tidak bertanggungjawab anda. Timbalan Ketua Polis Negara berpendapat bahawa sikap anda tersebut wajar dikenakan hukuman 'Buang Kerja'.
- I**

This clearly showed that the appropriate disciplinary authority ('ADA') did not consider the other form of punishment it had to consider, namely 'reduction in rank'. The ADA was so fixated with the view of only considering dismissal that it had failed to give any consideration at all to the punishment of a possible reduction in rank.

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I say fixated because in his affidavit in reply to this application, the then Timbalan Ketua Polis Negara, Tan Sri Abd Rahim bin Mohd Noor (TKPN), averred that pursuant to the powers given to him by the Police Commission as the Timbalan Ketua Polis Negara, he had the authority in disciplinary proceedings to 'menahan kerja, menggantung kerja dan mengenakan tindakan buang kerja ke atas Pegawai Kanan Polis yang tertentu sebagaimana yang didefinisikan di dalam statut, termasuklah pegawai yang berpangkat Inspektor'.

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It is clear from this paragraph that the TKPN was aware that statutorily this applicant must be given the opportunity of being considered for the alternate punishment. Whilst he accepts that he is bound by the statute, clearly he has omitted to mention what the statute, by virtue of general orders 23, 24, 25 and 26 has fixed as an alternative punishment, namely reduction in rank. The TKPN has stated that he had the power to suspend an employee. Obviously, he must have relied on general order 24 which gives him the right to consider dismissal, or reduction in rank, or a punishment lesser than dismissal or reduction in rank.

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As to his concession that the general order is regulated by statute, this view has been given judicial approval (see *Ghazi bin Mohd Sawi and Yap Jack Keet v Ketua Polis Negara & Anor* [2000] 7 CLJ 74 at p 83).

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However although he concedes that the statutory provisions that govern the general order allows him to consider alternate punishment, in his affidavit he refers to only one punishment for the applicant, that is dismissal. He says as follows:

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Saya telah berpuas hati bahawa pemohon telah melakukan suatu salah laku yang pada pendapat saya boleh dikenakan hukuman buang kerja di bawah Perintah-perintah Am itu.

He goes on further to say:

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... saya setelah memberi pertimbangan terhadap representasi pemohon dengan teliti dan saksama, saya pada 21 Disember 1992 telah berpuas hati dan berkeputusan bahawa pemohon telah gagal membebaskan dirinya dari kesemua alasan-alasan tindakan tatatertib yang dikemukakan terhadapnya dan seterusnya hukuman buang kerja terhadap pemohon telah dijatuhkan'.

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What is unacceptable about this decision is that in his representation made in response to the three charges preferred against him, the applicant himself had pleaded that he be not dismissed but be given alternative punishment. This is what he said:

Saya bersedia menerima hukuman dan saya mohon kepada Yang Berbahagia Tan Sri supaya saya jangan ditamatkan daripada perkhidmatan kerana saya tidak ada mempunyai cara lain untuk mencari nafkah bagi menanggung anak isteri dan tanggungan saya. Dengan saya dibuang kerja masalah yang saya

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A hadapi ini tidak akan selesai malahan akibat dan angkubahnya akan berterusan, seterusnya keluarga dan tanggungjawab saya akan turut terlibat dalam kancan masalah ini. Sekali lagi saya merayu kepada Yang Berbahagia Tan Sri supaya saya diberi lagi satu peluang untuk memperbaiki diri dan keadaan ini relalah saya menerima hukuman kecuali dibuang kerja’.

B Since the applicant himself had brought to the attention of the ADA that punishment other than dismissal ought to be considered, the ADA was duty bound to have, at that stage, amended its notice in writing or at least to inform the applicant that they would be considering alternative punishments. Instead the ADA totally disregarded the applicant’s plea and proceeded to consider only dismissal.

C Finally it must be pointed out that general order 36 states that the Disciplinary Authority may impose on an officer any one or any combination of two or more of the following punishments:

- (a) warning;
- (b) reprimand;
- D (c) fine;
- (d) forfeiture of salary;
- (e) stoppage of increment;
- (f) deferment of increment;
- E (g) reduction of salary;
- (h) reduction in rank;
- (i) dismissal.

It is obvious that in this case there was flaw in the decision-making process that warrants this court’s interference.

F In *Chai Kok Choy v Ketua Polis Negara & Ors* [2002] 4 MLJ 364 in dealing with a similar situation, this is what I said at p 368:

G It is clear from the Regulations that gives the disciplinary authority the power to sit in judgment over the plaintiff that it must consider whether each of the breaches complained of merited a punishment of dismissal or reduction in rank and that it is incumbent on the said disciplinary authority to consider all the available information, and after such consideration, if it appears to the said disciplinary authority that such information clearly presented a prima facie case against the plaintiff, then the plaintiff could either be dismissed or reduced in rank. In this case, the disciplinary authority’s focus was only on dismissal. In doing so, clearly the disciplinary authority had acted ultra vires its powers as contained in general order 28(1).

H The disciplinary authority had no power to prejudge on the charges and decide for itself that the charges merited only the punishment of dismissal. Having taken such a one-sided view, the disciplinary authority could not be said to be unbiased. Having made its decision that the plaintiff was entitled only to an acquittal or to the draconian punishment of dismissal without considering the alternative punishment of reduction in rank, the disciplinary authority has clearly not complied with general order 38 whereby it could have had the choice of any one of seven punishments for consideration. In *Inspector-General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260, the Federal

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Court held that as the show cause letter did not direct the respondent's attention to the possibility of the punishment of reduction in rank, it had not sufficiently complied with the requirement under para (2) of the old General Orders Chapter D 30.

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Also in *Mohanaraj all Muniandy v Pengarah Jabatan Perkhidmatan Haiwan & Anor* [2002] 3 MLJ 558 where the plaintiff was put in a similar predicament without the Public Services Commission considering the alternative lesser punishment of reduction in rank and only considering dismissal, I held that since there was no requirement for the Public Services Commission to give any reasons, it was all the more incumbent upon the Public Services Commission to have expressed in no uncertain terms and in clear precise language that it had considered both punishments and that the facts demanded the punishment of dismissal and none other. By its dismissal letter, the Public Services Commission had failed to state if it had also considered the lesser alternative punishment and this amounted to a failure in the decision-making process. Coming to the case before me, it is my judgment therefore that even on this ground the applicant must succeed.

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Bias

On 8 April 1992 the Timbalan Ketua Polis Kedah Darul Aman wrote to the Ketua Polis Negara that he had explained to the applicant the contents of two letters dated 10 March 1992 and 30 March 1992 and that the applicant had agreed to settle the loan in instalments of RM250 per month commencing from April 1992. However on 23 May 1992, the applicant wrote to the Timbalan Ketua Polis Kedah Darul Aman that because of the month of Syawal, he was unable to start payment in April but that he would pay from May. This letter was titled 'Undertaking to settle the debt'. However Dato' Tan Heng Chew, the lender wrote to the applicant a letter dated 10 December 1992 in which he returned two postal orders for RM250 each on the basis that the period to cash it had expired with a request to issue two fresh postal orders. The letter also stated that this was not in tune with the agreement entered into between themselves on 1 January 1992 and the applicant was requested to take the appropriate action. Now what is interesting to note is that this Dato' Tan had carbon copied this letter to Tuan Haji Mohd Said Awang, the Ketua Polis Daerah Kedah Darul Aman and also to the Pengarah Pentadbiran, Ibu Pejabat Polis DiRaja Malaysia, Bukit Aman, Kuala Lumpur, for the attention of one Dato' Hj Ahmad Ragib.

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It is the applicant's complaint before me that since he had agreed with Dato' Tan, who incidentally was at that time the Deputy Manager of Tan Chong Motors, that he would effect payment by monthly RM250 payments, Dato' Tan could have proceeded by due process of law to obtain the sum loaned, instead of complaining to the Ketua Polis Kedah Darul Aman. Further the applicant pointed out that Dato' Tan had not even demanded the loan in writing. I must also add that whilst Dato' Tan had stated in his letter dated 10 December 1992, that there was an arrangement

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- A for the payment of the loan between him and the applicant, he had not by a letter or an affidavit, explained what that arrangement for the payment, was to have been. The applicant averred in his affidavit that the said Dato' Tan was a good friend of one Dato' Hj Ahmad Ragib the Penolong Ketua Urusetia KPN (Tatatertib) and who had signed the dismissal letter and had made use of their relationship to exert pressure and cause the setting up of
- B the disciplinary proceedings against him. In respect of this averment, Tan Sri Rahim Noor who filed the reply affidavit had stated that he had no personal knowledge of this allegation. Besides, Dato' Hj Ahmad Ragib himself did not file any affidavit to rebut this allegation.

- C The applicant's case is that there was unnecessary pressure exerted upon him and that he was also made to give an undertaking to settle the loan.

- D Notwithstanding the fact that there has been no reply affidavit to counter the applicant's contention that Dato' Tan knew Dato' Hj Ahmad Ragib and had therefore exploited that relationship and through him had obtained the help of the Timbalan and the Ketua Polis Daerah Kedah Darul Aman to extract an undertaking from him to settle, I am unable to agree with the applicant on this issue. There is no actual evidence that pressure had been exerted. I find that the Timbalan and the Ketua Polis Daerah Kedah Darul Aman had in fact been advising the applicant to resolve the payment of the loan as had the Ketua Polis Negara. I find no substance of
- E bias.

Delegatus non potest delegare

- F It is the applicant's case that the dismissal letter was not signed by the Timbalan Ketua Polis Negara or by his authorized officer, Dato' Hj Ahmad Ragib bin Hj Mohd Salleh, the Penolong Ketua Urusetia KPN (Tatatertib). The signature is a scribble with the word 'for' placed before Dato' Hj Ahmad Ragib bin Hj Mohd Salleh and with the handwritten letters AOL which I take to mean 'Absent On Leave'.

- G In *Marzuki Abdul Aziz v Ketua Polis Negara & Anor* [2003] 3 CLJ 315, the Court of Appeal held that whilst the Deputy Inspector General of Police has the power to initiate disciplinary proceedings and to impose the required punishment, however the working and signing of both the show cause and dismissal letters by someone else was not fatal since the signing by someone' else was not part of the decision-making process of the Deputy Inspector General of Police, but that the signing by someone else was a
- H mere administrative action or function more so when the letter began with the words 'Saya diarahkan ...'. Further in the case before me although the actual name of the person signing had not been typed or printed, the Deputy Inspector General of Police, Tan Sri Abdul Rahim bin Mohd Noor who affirmed the affidavit had identified the person as Johar bin Che' Din a Police Officer, authorized by him to sign on his behalf. To my mind this
- I affidavit is sufficient and with the binding precedent of the case of *Marzuki*, the argument of the applicant that the maxim *delegatus non potest delegare* (a delegate cannot further delegate the power to someone else) ought to apply,

must fail. It is not Dato' Hj Ahmad Ragib bin Hj Mohd Salleh who delegated the authority to Johar to sign. It was the Deputy Inspector General of Police himself who authorized Johar to sign.

After considering all the arguments, I find that the applicant had been wrongly dismissed. I therefore order that the applicant be reinstated in the Police Force in his former position and to accrue all benefits to date. The applicant would also be entitled to such promotions that he would have received to date if not for the dismissal. The applicant will also have the costs.

Application allowed.

Reported by Lim Lee Na

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